COURT OF APPEALS
DECISION
DATED AND FILED

May 18, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2593 **Cir. Ct. No. 03CV004941**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

WEST END DEVELOPMENT CORPORATION,

PLAINTIFF-RESPONDENT,

V.

ROY'S PLUMBING SERVICE, INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Roy's Plumbing Service, Inc. (Roy's) appeals from an order denying its motion to open a default judgment entered against it by West End Development Corporation (West End). Roy's claims the trial court erroneously exercised its discretion in denying its motion. Because Roy's failure

to timely respond to the complaint of West End was not the result of excusable neglect, we affirm.

BACKGROUND

¶2 It is undisputed that on or about May 14, 2001, Roy's and West End executed a contract in which Roy's agreed to perform certain services and provide certain materials for the purpose of performing a "roof tear off" at a residential property located at 3132 West Mount Vernon Avenue in Milwaukee, Wisconsin, for an agreed price of $7100. Included in the contract were warranties for the material and the labor. When the work was completed, West End paid Roy's $6500 which was the net from the originally agreed upon price, less set-offs. Subsequently, the roof leaked causing other damage to the residence. West End claimed that it suffered $11,595 in damages to repair the work performed and guaranteed by Roy's.

¶3 Informal discovery took place between the parties through counsel. On May 15, 2003, West End's counsel informed Roy's that it had supplied it with all the documents that existed in the matter. It further informed Roy's that if the dispute was not settled by May 23, 2003, West End would commence litigation. Roy's did not respond. On June 2, 2003, West End filed suit. On June 4, 2003, substituted service was obtained upon an employee in Roy's office. When no answer was filed, West End obtained a default judgment for $11,595 plus attorney's fees of $862.50, for a total judgment of $12,457.50, plus costs and disbursements.

¶4 The order for judgment was signed on July 30, 2003. On August 1, 2003, Roy's received a notice of taxation of costs. It immediately contacted its counsel who filed a notice of motion to open the judgment and included a

proposed answer to the claim. The bases for the motion were: (1) Roy's had not been properly served with a summons and complaint; (2) its failure to answer was due to mistake, inadvertence, surprise or excusable neglect; and (3) the interests of justice justified opening the default judgment.[1] Attached to the motion was an affidavit from the president of Roy's, averring that "neither he or any other officer, director, or person in charge of the office was served with a copy of a Summons or Complaint." After hearing oral argument, the trial court denied the motion. Roy's now appeals.

ANALYSIS

¶5 The main thrust of Roy's appeal is based upon the alleged presence of excusable neglect. In reviewing appeals relating to default judgments, we are mindful that a decision to vacate a default judgment, like a decision to grant a default judgment, is addressed to the discretion of the trial court and will be reversed only upon an erroneous exercise of discretion. ***Baird Contracting, Inc. v. Mid Wisconsin Bank of Medford***, 189 Wis. 2d 321, 324, 525 N.W.2d 276 (Ct. App. 1994). Although the law views default judgments with disfavor, "[e]ven if the evidence favoring a default judgment is slight … an appellate court should affirm unless it [is] impossible for the trial court to grant the judgment in the exercise of its discretion." ***Martin v. Griffin***, 117 Wis. 2d 438, 442, 344 N.W.2d 206 (Ct. App. 1984).

[1] Since Roy's has not advanced or developed its "interests of justice" claim on appeal, we deem it waived and thus it will not be addressed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶6 In determining the existence of an honest mistake or excusable neglect, the basic question is whether the dilatory party's conduct was excusable under the circumstances, "since nearly any pattern of conduct resulting in default could alternatively be cast as due to mistake or inadvertence or neglect." ***Hansher v. Kaishian***, 79 Wis. 2d 374, 391, 255 N.W.2d 564 (1977). Excusable neglect is "'that neglect which might have been the act of a reasonably prudent person under the same circumstances'" and is "'not synonymous with neglect, carelessness or inattentiveness.'" ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982) (citation omitted). We must affirm the judgment unless we are prepared to find excusable neglect as a matter of law in all circumstances such as those presented by Roy's. ***Id.*** at 475-76. The burden is upon Roy's to demonstrate excusable neglect.

EXCUSABLE NEGLECT

¶7 Roy's claims that the existence of excusable neglect warrants opening of the judgment entered against it. We are not convinced for two reasons. First, the very basis for the excusable neglect argument is riddled with a fundamental contradiction. In Roy's motion papers, it includes an affidavit from its president, Roy Nelson, who denied that "any … officer, director, or person in charge of the office was served with a copy of a Summons or Complaint." Yet, the affidavit of service, which is included in the record, clearly shows that service was obtained upon "S. Nelson." At the motion hearing, when the trial court questioned Roy's counsel about this inconsistent position, counsel acknowledged that service had been obtained upon the twenty-seven-year-old daughter of the president, Shevoni Nelson, who was working in Roy's office on the day of service. For reasons not evident from the record, Shevoni did not offer, by affidavit or testimony, any explanation regarding the manner or method of service. Because

service was obtained upon Shevoni, the absence of any evidence from her, when coupled with recanting the denial that any service had been obtained, leaves no basis to challenge jurisdiction over the corporation. It is clear from the comments of the trial court that, as a result of this glaring contradiction and omission, it totally discredited Roy's affidavit supporting the motion to open the judgment. If these comments by the trial court did not constitute express findings of fact, they certainly are implicit in the context of the total oral decision and are not clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

¶8 Second, in addressing whether the acts of admission or omission on the part of Roy's officers and employees were those of reasonably prudent individuals under the same circumstances, the trial court reviewed the case law cited as authority to grant the motion and then it reviewed Roy's actions.

¶9 Roy's basically relied upon ***Baird Contracting***. It argued that the factual negligence that resulted from the non-actions of a bookkeeping supervisor of a bank wherein excusable negligence was found and a default judgment was opened, were similar in nature to what happened in its office. The trial court was not persuaded that Roy's "*a pari*" argument applied, for a very clear-cut reason. In ***Baird***, the bookkeeping supervisor admitted she had received the pleadings and gave an explanation of what happened to them. ***Id.***, 189 Wis. 2d at 325-26. Here, as observed by the trial court, "they didn't even admit they had it." The court then explained its rationale:

> [I]t seems to me that when he got this notice of judgment for $12,000 and realized what allegedly happened, there are only seven people in the place and he is one of them … and at least one of them is his daughter, it wouldn't take much effort to talk to each of those individuals … --

> On June 4th, did you receive a summons and complaint from West End Development Corporation? And I would have thought that is what he would have done before he signed an affidavit saying, not only did no officer, director or owner of the company receive it, but, nor have we been able to locate anybody else who could have been served with it. It just wouldn't have been that difficult to do and I'm troubled by that quite frankly, given the small, the size of his operation.

¶10 There is no question in this court's mind, Roy's argument to the contrary, notwithstanding that the trial court, if not expressly, most certainly, implicitly applied the "prudent person under the same or similar circumstances" rule in arriving at its decision to deny the motion. Moreover, any further analysis as to whether Shevoni's conduct constituted excusable neglect was impossible because she did not offer any explanation as to her actions after receiving the summons and complaint. The only explanation offered is that the papers were "mislaid or became lost." Excusable neglect is "that neglect which might have been the act of a reasonably prudent person under the same circumstances." ***Martin***, 117 Wis. 2d at 443. Excusable neglect "is not synonymous with neglect, carelessness or inattentiveness." ***Id.*** Based on the record before us, Roy's has failed to satisfy its burden of proof. There is no testimony or affidavit describing the specific facts and circumstances as to how the summons and complaint were mislaid or lost. Roy's explanation here, without any additional description, amounts to mere carelessness, rather than "excusable neglect."

¶11 From our reading of the record, it is manifest that the trial court examined the relevant facts, applied the proper standard of law, and employed a rational process to reach a conclusion that a reasonable judge could reach. There was no erroneous exercise of discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.